

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BIRUTE GUDENAVICHENE,

Plaintiff,

v.

BAC HOME LOAN SERVICING, LP, et al.,

Defendants.

2:11-cv-687-RCJ-GWF

ORDER

Currently before the Court is Plaintiff Birute Gudenavichene's Motion for a Temporary Restraining Order (#6).

BACKGROUND

On April 29, 2011, Plaintiff Birute Gudenavichene ("Plaintiff") filed a complaint in this Court against Defendants BAC Home Loan Servicing, LP; Bank of America, N.A.; Countrywide Home Loans, Inc.; U.S. Bank, N.A., as trustee for Harbor View Mortgage Loan Trust 2005-2; Mortgage Electronic Registration Systems, Inc. ("MERS"); and Recontrust Company, N.A. (collectively "Defendants"). (Compl. (#1)). The complaint alleged the following. Plaintiff was the lawful title holder to real property located at 8422 Galliano Ave., Las Vegas, NV 89117. (*Id.*). Plaintiff, as a borrower, signed the note showing her obligation to repay the borrowed funds to the lender, Countrywide Home Loans, but Countrywide did not sign the note. (*Id.* at 3). She asserts that the only entity entitled to foreclose on her home is the lender or a transferee of the note who holds the right to collect the funds under the note. (*Id.* at 4). She asserts that none of the defendants make that claim. (*Id.*). She disputes the authority of the individuals who executed the deed of trust, substitution of trustee, notice of default, and notice

1 of trustee's sale on behalf of Defendants. (*Id.* at 5). She asserts that she has no monetary
2 obligation to any of the Defendants except Countrywide Home Loans or its duly designated
3 assignee who has the right to receive payments under the note as a "Note Holder." (*Id.*). She
4 asserts that only Countrywide Home Loans or its duly appointed transferee has any right to
5 institute a foreclosure under the Deed of Trust. (*Id.*).

6 She alleges the following causes of action: (1) wrongful foreclosure; (2) declaratory
7 relief; (3) violations of NRS § 107.080; (4) unjust enrichment/promissory estoppel; (5)
8 interference with contractual relationship; (6) slander of title; and (7) injunction. (*Id.* at 5-11).

9 In support of her complaint, Plaintiff attached the deed of trust, substitution of trustee,
10 notice of default, and notice of trustee's sale which demonstrate the following. (*Id.* at 14-50).
11 Plaintiff executed a note secured by a deed of trust on a piece of property located at 8422
12 Galliano Avenue, Las Vegas, Nevada, 89117. (Deed of Trust (#1) at 15, 17). The mortgage,
13 dated February 10, 2005, was for \$400,000. (*Id.* at 15). The lender on the deed of trust was
14 Countrywide Home Loans, Inc. (*Id.*). The trustee on the deed of trust was CTC Real Estate
15 Services. (*Id.*). MERS was named "a nominee for Lender and Lender's successors and
16 assigns" and claimed to be the beneficiary under the security instrument. (*Id.*).

17 On December 1, 2007, Plaintiff defaulted on her mortgage payments for an unspecified
18 amount. (See Notice of Default (#1) at 47). On July 1, 2010, "U.S. Bank National Association,
19 as trustee, for the benefit of Harbor View 2005-2 Trust Fund, by BAC Home Loans Servicing,
20 LP FKA Countrywide Home Loans Servicing LP" executed a substitution of trustee and
21 replaced Recontrust Company as the trustee for CTC Real Estate Services. (Substitution of
22 Trustee (#1) at 44-45).

23 On July 2, 2010, Recontrust filed a notice of default and election to sell with the Clark
24 County Recorder's office. (Notice of Default (#1) at 47). On March 14, 2011, Recontrust filed
25 a notice of trustee's sale with the Clark County Recorder's office. (Notice of Trustee's Sale
26 (#1) at 50-51). According to the Motion for TRO, the trustee's sale is scheduled for May 3,
27 2011, at 10:00 a.m. (Mot. for TRO (#6) at 2).

LEGAL STANDARD

Federal Rule of Civil Procedure 65(b) permits a court to issue a temporary restraining order without written or oral notice to the adverse party only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and

(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.

Fed. R. Civ. P. 65(b)(1)(A)-(B).

DISCUSSION

Plaintiff seeks a TRO because she asserts that the foreclosure sale is wrongful and improper. (Mot. for TRO (#6) at 2). She asserts that she does not owe any of the foreclosing entities any money with respect to her home. (*Id.* at 5). She asserts that she has a likelihood of success on the merits because none of the foreclosing defendants are the beneficiary or successor in interest of the beneficiary or trustee. (*Id.* at 8).

Nevada law provides that a deed of trust is an instrument that may be used to "secure the performance of an obligation or the payment of any debt." NRS § 107.020. Upon default, the beneficiary, the successor in interest of the beneficiary, or the trustee may foreclose on the property through a trustee's sale to satisfy the obligation. NRS § 107.080(2)(c).

The procedures for conducting a trustee's foreclosure sale are set forth in NRS § 107.080. To commence a foreclosure, the beneficiary, the successor in interest of the beneficiary, or the trustee must execute and record a notice of the breach and election to sell. NRS § 107.080(2)(c). The notice of default and election to sell must "[d]escribe the deficiency in performance or payment and may contain a notice of intent to declare the entire unpaid balance due if acceleration is permitted by the obligation secured by the deed of trust." *Id.* § 107.080(3)(a).

The trustee or other person authorized to make the sale must wait three months after recording the notice of default and election to sell. NRS § 107.080(2)(d). After the three month period, the trustee must give notice of the time and place of the sale. *Id.* § 107.080(4).

1 Under NRS § 107.080(5), a “sale made pursuant to this section may be declared void by any
2 court of competent jurisdiction in the county where the sale took place if . . . [t]he trustee or
3 other person authorized to make the sale does not substantially comply with the provisions of
4 this section.” *Id.* § 107.080(5)(a).

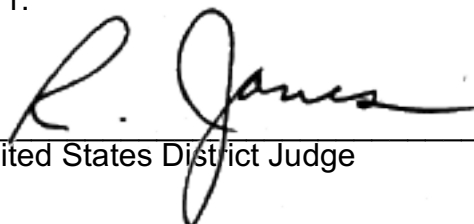
5 A nominee on a deed of trust has the authority, as an agent, to act on behalf of the
6 holder of the promissory note and execute a substitution of trustees. *Gomez v. Countrywide*
7 *Bank, FSB*, 2009 WL 3617650, * 1 (D. Nev. 2009). As long as the note is in default and the
8 foreclosing trustee is either the original trustee or has been substituted by the holder of the
9 note or the holder’s nominee, there is no defect in the Nevada foreclosure. *Id.* at *2.

10 In this case, the Court denies the motion for a TRO. In 2008, Bank of America acquired
11 Countrywide Financial and took over its home loans. (See Bank of America Merger History
12 at <http://message.bankofamerica.com/heritage/#/merger-history/country-financial>). As a result,
13 Bank of America re-branded its mortgage offerings as Bank of America Corporation Home
14 Loans, or BAC Home Loans. (*Id.*). Therefore, in 2010, BAC Home Loans was the lender on
15 the deed of trust who properly gave U.S. Bank National Association the authority to execute
16 a substitution of trustee. (See Substitution of Trustee (#1) at 45). Thus, Reconstrust as the
17 properly substituted trustee had the authority to initiate foreclosure proceedings by filing a
18 Notice of Default the next day. Accordingly, the Court denies the Motion for TRO (#6).

19 CONCLUSION

20 For the foregoing reasons, IT IS ORDERED that Plaintiff’s Motion for a Temporary
21 Restraining Order (#6) is DENIED.

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23 DATED: This 3rd day of May, 2011.

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25 
26 United States District Judge
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